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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WASHINGTON LEGAL FOUNDATION,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
AMERICAN BAR ASSOCIATION, AND PUBLIC CITIZEN,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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Dated: September 22, 1988

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QUESTION PRESENTED

Did the district court, in correctly ruling that the American Bar Association's Standing Committee on the Federal Judiciary "fits squarely" within the definition of an advisory committee under the Federal Advisory Committee Act ("FACA") because of the advisory role that committee plays in screening prospective judicial nominees, nevertheless err in granting summary judgment for the appellee Department of Justice on the grounds that none of FACA's provisions may be constitutionally applied in this case because all such provisions would violate the doctrine of separation of powers by interfering with the Executive's nomination power under Article II, especially where there was no record evidence suggesting that the application of any provision of FACA would in fact disrupt the nominating process in any way?

PARTIES TO THE PROCEEDINGS BELOW

Appellant Washington Legal Foundation was the plaintiff below. Appellee United States Department of Justice was the defendant. Appellee American Bar Association intervened as a party defendant after the judgment was entered solely for purposes of participating in any appeal. Appellee Public Citizen intervened as a party plaintiff.

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JURISDICTIONAL STATEMENT

OPINION AND ORDER BELOW

The opinion and judgment of the district court, which are not officially reported, are reproduced in Appendix A annexed to the Jurisdictional Statement filed on September 9, 1988, by Appellee Public Citizen (App. 1a-28a) which had intervened below as a party plaintiff. In the interest of judicial economy, and by direction of the Supreme Court Clerk's Office, appellant Washington Legal Foundation will not reproduce that opinion or the statute involved here, but instead will refer to them as they are

reproduced in Appendices A and D to Public Citizen's Jurisdictional Statement.

JURISDICTION OF THIS COURT

This is an appeal from the final judgment of the United States District Court for the District of Columbia, filed on August 4, 1988, and entered on August 8, granting appellee U.S. Department of Justice's motion to dismiss which was converted by the district court into a motion for summary judgment, dismissing appellant's alternative motion for summary judgment, and dismissing the action. App. 27a-28a. In its complaint filed in the district court, appellant invoked federal jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, 2201, and 2202.

Notice of appeal from that decision was filed by appellant on August 26, 1988 and is reproduced herein as Appendix A.[1] Because the district court declared an Act of Congress unconstitutional as applied in a civil action to which the United States Department of Justice, an agency of the United States, was a party, this Court has exclusive jurisdiction under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause of the United States Constitution, Art. II, § 2, cl. 2, provides in pertinent part that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment

[1] Appellee Public Citizen filed its Notice of Appeal on September 1, 1988, and filed its Jurisdictional Statement on September 9, 1988 in this Court.

> of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. III, § 1 states in pertinent part that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

U.S. Const., Art. I, § 8, cl. 18 states that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The Federal Advisory Committee Act, 5 U.S.C. App. I, is reproduced in Appendix D to Public Citizen's Jurisdictional Statement (App. 31a-45a).

STATEMENT OF THE CASE

The Federal Advisory Committee Act, 5 U.S.C. App. I ("FACA"), was enacted in 1972 by the Congress to regulate the operation of private advisory committees "established or utilized" by the Executive branch and officials. *Id.*, §§ 2, 3. (App. 31a-32a). As an "open government" law, FACA is essentially an amalgam of the Freedom of Information Act, 5 U.S.C. §§ 552 *et seq.*, and the Government-in-the-Sunshine Act, 5 U.S.C. §§ 552b, *et seq.* *See* FACA, § 10 (App. 41a).

Just like other "open government" laws, FACA does not interject the Congress into any operation of the Executive department. Rather, FACA, like the FOIA, leaves the execution of these laws with the Executive branch. The "beneficiary" of such laws is the public at large. The only role for Congress to play under FACA is an incidental one: charters of advisory committees must simply be filed with the appropriate "standing committees

of the Senate and of the House of Representatives" having oversight of that agency. FACA, §§ 5(a), 9(c) (App. 33a, 40a). Indeed, FACA expresses Congress' concern that advisory committees be advisory only and should not usurp the Executive's substantive decisionmaking powers. FACA, § 9(b) (App. 39a-40a).

While most litigation under FACA involves disputes with advisory committees "established" either by the Congress or by an agency, a substantial amount of FACA litigation, such as the instant case, involves disputes about whether a putative advisory committee "utilized" by the Executive branch is subject to FACA's requirements. *See* cases cited in the district court's opinion below at App. 8a-11a.

On December 11, 1985, appellant Washington Legal Foundation ("WLF") filed suit against the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee"), its members, and the ABA, seeking declaratory and injunctive relief that the Federal Advisory Committee Act ("FACA") applies to the Committee's advisory role with the Department of Justice in the selection of suitable judicial candidates for subsequent consideration by the President. *See Washington Legal Foundation v. American Bar Ass'n Standing Comm. on Federal Judiciary*, 648 F. Supp. 1353 (D.D.C. 1986) (*"WLF I"*). That suit was filed after the Committee had expressly refused to comply with WLF's request that it be given information that the Committee had shared with other groups, refused to provide WLF with any information about its meetings, and stated that it did not consider FACA to apply to any of its activities. While that suit is not at issue in this appeal, a brief description of that case is necessary to help place the instant case in proper perspective, and because the court below bootstrapped the alleged "findings" from *WLF I* into the decision in this case.

Shortly after the complaint was filed in *WLF I*, WLF attempted to conduct discovery. However, the district court, over opposition by WLF, ordered on February 5, 1986, that discovery was "premature," apparently because of representations made that a dispositive motion would be filed by the ABA defendants. The ABA Committee subsequently filed an answer and motions to dismiss, arguing, *inter alia*, that WLF lacked standing, that FACA does not apply to the ABA Committee, and that if it did, FACA would violate the separation of powers by interfering with the President's nominating power under Article II, as well as violate the ABA Committee's first amendment rights.

On April 8, 1986, WLF filed an opposition to the motion to dismiss, and suggested to the court that since the constitutionality of an Act of Congress was in question, it should certify that fact to the Attorney General pursuant to Rule 24(c) of the Federal Rules of Civil Procedure and 28 U.S.C. § 2403(a) for possible intervention by the United States. With no action forthcoming on either the pending motion or WLF's suggestion for notification, WLF filed an unopposed motion on May 30, 1986, to add the Department of Justice as a party defendant. On August 14, the Court inexplicably denied the motion to add the Department of Justice as a defendant, and at the same time, issued a notification to the Attorney General under 28 U.S.C. § 2403 to intervene if it wanted to.

On October 6, 1986, the United States notified that the Court that it would not intervene in the case despite the fact that the constitutionality of an Act of Congress was in question. Because the Court denied WLF's motion to add the Department of Justice as a defendant, and because the United States declined to intervene in the case, WLF filed the instant action on October 21, 1986 against the Justice Department. This action was assigned to Judge Green as a related case. *Washington Legal Foundation v. U.S. Department of Justice*, No. 86-2883 (D.D.C.) (*WLF II*).

Finally, on November 26, 1986, Judge Green granted the ABA Committee's motion to dismiss in *WLF I* without having held any oral argument on the matter, ruling that while our allegations of injury in our complaint were sufficient to confer standing, a suit under FACA lies against the agency utilizing the committee, *i.e.*, the Justice Department. 648 F.Supp. 1353 (D.D.C. 1986) She so ruled despite our earlier attempts, which were rebuffed by the court, to add the Department in that proceeding, and despite some authority that a FACA suit would lie solely against the putative advisory committee. *See, e.g., Public Citizen v. Commission on the Bicentennial of the U.S. Constitution*, 622 F. Supp. 753 (D.D.C. 1985). WLF appealed that dismissal to the United States Court of Appeals for the District of Columbia Circuit. *WLF v. ABA Standing Comm.*, No. 87-7022 (D.C.Cir.). On April 27, 1987, the Court of Appeals ordered the appeal to be held in abeyance pending resolution of the instant case.

Meanwhile, in *WLF II*, the Department of Justice filed a motion to dismiss on January 2, 1987, accompanied by a Declaration by Steve A. Mathews of the Justice Department's Office of Legal Policy. That motion raised essentially the same arguments as did the ABA Committee's motion to dismiss in *WLF I*, except for the issue of standing and the first amendment. Although the Department of Justice principally argued that the application of FACA would violate the separation of powers, it did not formally notify the Congress of that fact as is apparently required by 28 U.S.C.S. § 519 note (Supp.I 1988) (Attorney General required to notify the Congress if the Department is refraining from defending "any provision of law enacted by the Congress because of the position of the Department of Justice that such provision of law is unconstitutional").

On February 4, 1987, WLF filed its opposition to the motion to dismiss. On the same day, appellee Public Citi-

zen moved to intervene as a party plaintiff and filed a complaint and motion for summary judgment. The complaint by Public Citizen was essentially the same as that filed by WLF except that Public Citizen did not allege that it had requested any documents from the ABA or had any desire to attend any meeting or otherwise participate in the judicial screening process; rather, it simply alleged that it had a generalized interest in "government accountability" and "the process by which judges are chosen, because it [Public Citizen] regularly brings cases in the federal courts." Public Citizen Complaint ¶ 3. On March 11, the Court allowed Public Citizen to intervene.[2]

On March 25, 1987, DOJ filed its reply to WLF's opposition as well as an opposition to Public Citizen's motion for summary judgment, along with a Statement of Material Facts. Responses were made to the various Statements of Material Facts, and although the Department of Justice never filed a formal motion for summary judgment, it was unclear whether the court intended to treat DOJ's motion to dismiss as one for summary judgment. Accordingly, appellant WLF filed a Rule 56(f) Affidavit under the Federal Rules of Civil Procedure on April 30, 1987, indicating that it needed discovery to respond to some of the assertions made in DOJ's Statement of Material Facts, which information was exclusively in

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[2] While the ABA unsuccessfully argued in *WLF I* that WLF lacked standing, the ABA, having intervened *after* the judgment in this case, may nevertheless raise that issue anew with respect to Public Citizen, or indeed, renew it with respect to WLF in the ABA's expected Motion to Dismiss or Affirm in response to the respective Jurisdictional Statements. The standing issue may even be raised by the Department of Justice in its Motion to Dismiss or by this Court *sua sponte*. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1985) (appellate court must satisfy itself "not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it"). For its part, WLF maintains that it has standing and will brief that issue if necessary in its opposition to the Motion to Dismiss or Affirm pursuant to Rule 16.5 of this Court.

DOJ's hands, as well as opposing some of the other assertions made by DOJ.

Coincidentally, the Court signed an order also on April 30 and received by appellant the next day, setting the case down for oral argument on May 26, 1987, for "cross-motions for summary judgment," thereby indicating for the first time the court's intention to treat DOJ's motion to dismiss as a motion for summary judgment. Accordingly, WLF filed on May 12 an "alternative" motion for summary judgment should the court be inclined to grant plaintiff-intervenor Public Citizen's motion for summary judgment. Yet by having filed a Rule 56(f) Affidavit, WLF's position was that summary judgment was improper at this stage for DOJ.

Oral argument was held on May 26, 1987, and the court took the matter under advisement for over 14 months. On August 4, 1988, the court finally issued its opinion holding that the ABA Committee is an advisory committee under the Act, but held that FACA would violate the separation of powers doctrine by interfering with the exclusive power of the President under Article II to nominate federal judges. App. 26a-27a. The Court held that the "role of Congress is limited to the Senate's advice and consent function" and that the "purposes of FACA are served through the public confirmation process." App. 27a. The court concluded by stating that all of the procedural requirements of FACA are "outweighed by the President's interest in preserving confidentiality" with respect to judicial nominees, (a) without clarifying precisely what information is needed to be kept confidential; (b) without considering provisions of FACA which do not raise confidentiality concerns, or indeed, which make express accommodation for them; and (c) without citing any record evidence from DOJ that FACA would interfere with the nominating process.

On August 25, the American Bar Association intervened for purposes of this appeal so that all parties are now consolidated in the same action.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented is substantial for a number of reasons. Although FACA has been on the books since 1972, the Supreme Court has yet to hear any case under the Act despite a substantial amount of FACA litigation in the lower courts over the last 15 years. In addition, the subject matter of the instant case deals with a matter of great public importance, namely, the integrity of the judicial nominating process and the public's participation in it. As Chief Justice Rehnquist recently stated, "Surely the question of who shall sit on the constitutional court of last resort of any nation is a vitally important question, one in which the public at-large as well as the Bar is entitled to have a say." *See* Remarks of William H. Rehnquist, Chief Justice of the United States, Before the Bicentennial Australian Legal Convention on August 29, 1988 at 13. Appellant submits that this statement has equal validity with respect to the nomination of judges to lower courts, all of which were created by Congress.[3]

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[3] The lower court held that FACA "cannot be constitutionally applied to the [ABA] Committee because of the express provision of Article II, § 2, cl. 2, of the Constitution that the President alone shall nominate candidates for federal judgeships." App. 27a. Article II is not so absolute, and the court's reading of it raises other questions with respect to the relationship between the nominating power and the appointment power. With respect to the judiciary, Article II gives the President the express power to nominate only "Judges of the supreme Court." The President does have the power to nominate "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." Since the lower courts are all created by the Congress, (*see e.g.*, 28 U.S.C. §§ 43, 44(a)), lower court judges would appear to be "inferior Officers" in an Article II sense. *Accord Clark v. United States*, 72 F. Supp. 594 (Cl. Ct. 1947), *cert. denied*, 333 U.S. 833 (1948). If that is true, then the Congress could under Article II vest the appointment of such judges "in the President alone, in the Courts of Law, or in the Heads of Departments." Congress has specified that the method of lower court appointments shall be by the President with the Senate's advice and consent. 28 U.S.C. §§ 43, 44(a). But if interbranch appointments are permis-

More importantly, the lower court's declaration that FACA cannot constitutionally be applied in this case because Congress would be unduly interfering with the nominating power of the President under Article II raises a major constitutional issue of grave import. If left undisturbed, the lower court's decision will raise doubts not only about the applicability of FACA to this and other Executive branch functions, but also about the constitutionality of FOIA and the Government-in-the-Sunshine Act, two constituent components of FACA. Appellant submits that this case clearly demands plenary consideration with briefs on the merits and oral argument.

I. FACA IS A PROCEDURAL STATUTE THAT DOES NOT INCREASE CONGRESS' POWER AT THE EXPENSE OF ANY SUBSTANTIVE POWER OF THE PRESIDENT.

The court below erroneously held that the application of FACA in this case would violate the separation of powers doctrine. In so doing, the lower court seriously misapplied this Court's separation of powers analysis in

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sible, *see Morrison v. Olson*, 108 S.Ct. 2597 (1988), then vesting the appointment of lower court judges in the Supreme Court, for example, would *a fortiori* pass constitutional muster. But even if the Congress were to place the *appointment* power of an inferior officer in the Courts, or, for that matter, in the Attorney General as the "Head of his Department," does that mean that the President still retains a *nominating* power with respect to that position? The President has never claimed that he retains a nominating power for inferior officers appointed by the "Courts of Law, or [by] the Heads of Departments." In *Morrison, supra*, for example, the independent counsel was appointed by the special court, with no nominating role by the President. This discourse into Article II is relevant to this case insofar as it credits Congress with more power under Article II with respect to lower court judges than the district court was otherwise willing to give, and concomitantly, suggests the nominating power held by the President over these offices is more limited than the lower court assumed.

Nixon v. Administrator, General Services, 433 U.S. 425 (1977), and recently reiterated in *Morrison v. Olson*, —— U.S. ——, 108 S.Ct. 2797 (1988). In *Nixon*, this Court stated that

> in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S., at 711-12. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443.

This Court's analysis of separation-of-powers questions focuses primarily on the intrusion of one branch of government into the substantive powers of another, as opposed to mere procedural mechanisms governing the operation of another branch of government. Thus, for example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Congress had attempted to arrogate unto itself the substantive nominating power belonging to the President under Article II by naming certain commissioners to the Federal Election Commission. In *Morrison v. Olson*, *supra*, Congress did not arrogate unto itself any substantive Executive power, but instead divested the Executive of a certain amount of its authority under the "Take Care Clause" of Article II by allowing for the appointment of an independent counsel by a special court, and limiting the President's implied removal power of that official. This Court held that this limited diminution of the substantive power of the President did not violate the separation of powers doctrine. *Id.* at 2619.

In stark contrast to those separation of powers cases, the instant case involves only procedural mechanisms re-

quired to be followed by the Executive branch in utilizing private advisory committees. FACA does not "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. GSA*, *supra*, at 443. The President is free to nominate any person he chooses to the federal bench. FACA does not attempt in any way to dictate the qualifications of those who may hold judicial posts or limit in any way the universe of those who may be nominated.[4] Unlike the situation in *Morrison* where the independent counsel exercises executive functions, the President does not retain any interest in the appointment of judges who are independent of the Executive branch and who can only be removed by the Congress through impeachment.

Thus, FACA's procedural commands do not disrupt the nominating process. Rather, they are more analogous to the procedural rules which Congress imposed on the courts in carrying out the judicial power under Article III. *See, e.g.*, Federal Rules of Evidence, authorized by Congress to be promulgated under 28 U.S.C. § 2076 and approved by Congress and enacted into law. Pub. L. 93-595, 88 Stat. 1926. The Executive is no more free to ignore the procedural requirements of FACA in exercising its powers than a court is free to ignore the Federal Rules of Evidence because in its view, some of the Rules

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[4] *Cf., e.g.*, 15 U.S.C. § 41 dealing with the Federal Trade Commission and similar organic statutes of other agencies that specify that the person to be nominated by the President to fill an agency post must have certain qualifications and characteristics, *e.g.*, that no more than a certain number of commissioners of an agency may have the same political affiliation. Nor is FACA an "attempt by Congress to increase its own powers at the expense of the Executive Branch," *Morrison v. Olson*, 108 S.Ct. at 2620, as might be the case, for example, where Congress has given itself, under 18 U.S.C. § 6005, the power (recently exercised) to grant immunity from prosecution, a purely executive function. *See United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982) (decision to seek immunity from prosecution "is the sole prerogative of the government being confined to the United States Attorney and his superior officers").

may interfere with its exercise of its judicial powers under Article III. Congress's power to make procedural requirements governing the other two branches stems, in part, from Congress's power under the Necessary and Proper Clause to make all laws necessary for carrying into execution all powers vested by the Constitution in "any Department or Officer" of the United States Government. Art. I, § 8, cl. 18. *See Boske v. Comingore*, 177 U.S. 459 (1900).

II. ASSUMING, *ARGUENDO*, THAT FACA DOES INTERFERE WITH THE NOMINATING PROCESS, THE DISTRICT COURT ERRONEOUSLY APPLIED THIS COURT'S BALANCING TEST IN CONCLUDING THAT ALL PROVISIONS OF FACA VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Even if FACA somehow prevents the Executive from accomplishing his constitutional duties, the application of the balancing test articulated by this Court in *Nixon v. Administrator of General Services*, 422 U.S. 425 (1977) compels a reversal of the lower court. As this Court stated in *Nixon*, "[o]nly when the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." The lower court misapplied both aspects of this balancing test.

A. As previously discussed, FACA does not disrupt or usurp any substantive function of the President under the Appointments Clause. Significantly, there is no record evidence in this case submitted by the Department of Justice that application of FACA to its utilization of the ABA Committee would either disrupt DOJ's role in screening judicial candidates for recommendation to the President, or disrupt the President's ability to seek advice from his immediate advisors on this subject. The only record evidence submitted below was a Declaration by Steve A. Matthews, Deputy Assistant Attorney Gen-

eral, Office of Legal Policy, United States Department of Justice to DOJ's Motion to Dismiss. That statement contains not a single sentence or suggestion that application of FACA would interfere with, let alone, disrupt, the nomination process. Nor is there any suggestion therein that DOJ's reliance on the ABA Committee is dependent upon confidential communications or deliberations. The Matthews Declaration merely confirms what appellant alleged in its complaint, that the DOJ utilizes the ABA Committee as an advisory committee in the judicial selection process. Consequently, the lower court's references throughout its opinion to the need for confidentiality and the disruption that would be caused by applying FACA are simply without any evidentiary basis. Some of its conclusions in this respect also seem to be based on alleged "findings" from *WLF I*, but as noted, *supra*, that case was decided on a motion to dismiss by the ABA Committee without any oral argument and without any discovery permitted to determine precisely what was meant by the vague assertions of the need for confidentiality.

B. Assuming, *arguendo*, that some provisions of FACA may interfere with the nominating process, that reason would not be sufficient for declaring that *all* the provisions of FACA cannot apply to the ABA Committee. Rather, federal courts are obligated to construe a federal statute to save as much of a statute as is constitutionally possible in order to give effect to the intent of Congress. *See United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971). The lower court erroneously found that all provisions of FACA violate the separation of powers doctrine "as applied" in this case without ever actually "applying" any of them in order to better assess the constitutional impediments those provisions might raise in the context of a particular case.

Had the lower court applied the statute, it would have learned that FACA contains provisions for exempting

from public disclosure certain "confidential" communications and proceedings which the court found, without any evidence, to be crucial to the ABA Committee's advisory role. As stated *supra*, since FACA is an amalgam of the FOIA and Government-in-the-Sunshine Act, many of the exemptions from disclosure in those laws apply to the FACA situation. *See, e.g.*, FACA, § 10(d) (App. 42a) incorporating by reference the exemption for public meetings found in 5 U.S.C. § 552b(c) of the Government-in-Sunshine Act. In addition, the Executive has not found the application of FACA to be disruptive of other important executive functions. In its Opposition, filed on February 4, 1987, to DOJ's Motion to Dismiss, appellant WLF cited a number of examples of the President's use of FACA in sensitive areas, such as the President's Special Review Board (the "Tower Commission") to investigate decisions made in the Iran-Contra affair (Exec. Order No. 12575, 51 Fed. Reg. 43718 (Dec. 3, 1986)) and the Presidential Advisory Board on Ambassadorial Appointments, Exec. Order No. 11970, 42 Fed. Reg. 7919 (1977).

If the lower court decision is allowed to stand, then the Executive could just as easily argue that FACA and the FOIA would be violative of the separation of powers doctrine as applied to, for example, the Department of Defense, since that department relates to and advises the President on the exercise of his exclusive Article II Commander-in-Chief powers. The same could be said for exempting the State Department from FACA and FOIA because of the President's foreign affairs powers. One could argue under the lower court's rationale that FACA and FOIA cannot apply at all to the entire Executive branch since it would interfere with the President's executive power under the "take care" clause of Article II. Indeed, one could argue that the separation of powers concerns are more weighty in these other examples than in the case at bar since the President's appointment power

is shared with the Senate, and because the particular appointments of concern in this case are not to the Executive branch, as in the case of ambassadorial appointments, but rather to the judicial branch.

C. Assuming, *arguendo,* that the lower court was correct in assessing the intrusive impact that the application of FACA would have upon the nominating process, the court also was short-sighted in weighing the other half of the *Nixon* balancing equation, *i.e.*, whether that impact is "justified by an overriding need to promote objectives within the constitutional authority of Congress." The lower court simply stated that since the Senate has a constitutional role to play in the nomination process, the integrity of the judicial selection process and the ABA Committee's role in it is maintained via the confirmation hearings by the Senate Judiciary Committee. App. 25a.

1. In appellant's view, the very fact that the Senate has a constitutional role to play in the judicial nominating process is evidence of greater, not less, Congressional authority in this area. Otherwise, one could argue that FACA and FOIA's "intrusion" on other Executive functions are not outweighed by the public interest in disclosure since oversight of those agencies or activities can be conducted by the respective committees in the Senate and House of Representatives.

2. While there is some degree of public scrutiny available under the public confirmation process, that scrutiny is of a limited degree, especially with respect to the nomination of lower court judges where hearings are less than searching, or where the ABA Committee has not been forthcoming in explaining their investigative techniques and criteria. In other cases, the confirmation process underscores the need for FACA and accountability in the ABA's advisory role. For example, when asked by the Senate Judiciary Committee why it ranked J. Harvie Wilkinson, III as merely "qualified," the lowest of the

three qualified ratings,[5] for a position on the U.S. Court of Appeals for the Fourth Circuit, the then chairman of the ABA Committee stated that "I believe that he [Mr. Wilkinson] has the capacity to become an outstanding appellate court judge. He was *remarkably well qualified* for that kind of work. . . ." Confirmation Hearings On Federal Appointments, Hearing before the Senate Comm. on the Judiciary, 98th Cong., 2d Sess., Part 3 at 330 (1984) (statement of Frederick G. Buesser, Jr.) (emphasis added). Apparently, in ABA jargon, "remarkably well qualified" means something less than "well qualified" since the rating Wilkinson actually received was a simple "qualified." Application of FACA would enable the public to learn more about the ABA's rating system and other subjective or political factors that may go into determining "judicial temperament."

3. The lower court's complete reliance on the confirmation process as a sufficient public safeguard against abuses by the ABA Committee neglects altogether that part of the process completely closed to public scrutiny that has the effect of "vetoing" a candidate before his or her name ever gets to the President's desk, let alone to the Senate Judiciary Committee. Indeed, the ABA prides itself on the virtual veto power it exercises behind the scenes when it rates a potential nominee as "unqualified." *See The ABA's Standing Committee on Federal Judiciary What It is and How It Works* 7 (1983).

The appellant also proffered below several examples of abuse by the ABA Committee that had been uncovered. In one case, the ABA Committee was called upon in early 1985 to investigate Professor William Harvey, former dean of Indianapolis University Law School, for a position on the Seventh Circuit. In 1981, Mr. Harvey had been President Reagan's Chairman of the Legal Services

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[5] The ratings of the ABA Committee given for lower court nominees, are, in descending order, "exceptionally well qualified," "well qualified," "qualified," and "not qualified." *See* App. 6a.

Corporation board, had cut wasteful LSC spending, and did not continue funding the ABA which had received $485,000 in LSC funds before the arrival of Mr. Harvey. Not only was the ABA highly critical of Harvey's stewardship at LSC, the ABA Committee member responsible for investigating Professor Harvey's judicial qualifications was also in charge of the ABA's Fund for Public Education, the recipient of past LSC largesse. Needless to say, the ABA Committee's conflict of interest was both real and apparent, and derailed a nomination before it could even get to the President's desk. In other case, appellant learned of the ABA Committee's investigation into the religious beliefs of a district court nominee, a fact later confirmed by a representative of the ABA.

Other examples of ABA Committee abuse abound which appellant could cite that may be only the tip of the iceberg. While the lower court effusively praised the ABA Committee's work in *dicta* (App. 26a), appellant and other members of the public are less than sanguine about the integrity of its closed-door screening process. That integrity would be restored to a considerable extent by making the ABA Committee just as accountable to the public as are the hundreds of other advisory committees used by the Executive branch.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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Dated: September 22, 1988

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2883

(Judge Joyce Hens Green)

WASHINGTON LEGAL FOUNDATION,
Plaintiff,

and

PUBLIC CITIZEN,
Plaintiff-Intervenor,

v.

U.S. DEPARTMENT OF JUSTICE,
Defendant,

and

AMERICAN BAR ASSOCIATION,
Defendant-Intervenor.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Washington Legal Foundation, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on August 4, 1988.

This appeal is taken pursuant to 28 U.S.C. 1252.

/s/ Paul D. Kamenar
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Dated: August 26, 1988

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served this 26th day of August, 1988, by first-class mail, postage pre-paid to:

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